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BRIEF FOR RESPONDENTS IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 631

DAVID CARLINER, et al., *Petitioners,*

v.

COMMISSIONER OF THE DISTRICT OF COLUMBIA, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether petitioners' claim that the Constitution confers on District of Columbia residents a right of self-government through elective officials presents an issue of sufficient substantiality to require the convening of a three-judge District Court.

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 8, Clause 17 of the Constitution of the United States:

> "Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as

> may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States * * *."

REASONS WHY THE WRIT SHOULD BE DENIED

The distilled essence of petitioners' contention is that this Court should exercise its certiorari jurisdiction in order to determine whether a three-judge court was required to adjudicate their claim that the Constitution confers upon District of Columbia residents a right of self-government. A three-judge court is required only where the constitutional question presented is a substantial one. *Bailey* v. *Patterson,* 369 U. S. 31 (1962). In concluding that petitioners' constitutional claim was wholly insubstantial, the United States Court of Appeals for the District of Columbia Circuit relied, *inter alia,* on a recent case involving the identical issue presented by petitioners: *Hobson v. Tobriner,* 255 F. Supp. 295 (D. D. C., 1966), petition for a writ of mandamus denied by the United States Court of Appeals for the District of Columbia Circuit *sub nom.*, *Hobson* v. *Gasch* (No. 20,838, September 29, 1966), petition for a writ of certiorari denied, 386 U. S. 914 (1967).

The contention that the Constitution gives District of Columbia residents the right to govern themselves through a locally elected body necessarily involves the contention that Congress has historically engaged in an unconstitutional usurpation of power whenever it enacted local measures in the exercise of its exclusive legislative authority over the District of Columbia. However, Article I, Section 8, Clause 17 of the Constitution, which authorizes Congress to "exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia, has been construed by this Court to mean that, with respect to the District, Congress possesses the combined powers of both a general and a local government, and that such powers are plenary and

unqualified. *O'Donoghue* v. *United States*, 289 U. S. 516 (1933); *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427 (1932). Moreover, this Court has consistently held that the constitutional power of Congress to legislate with respect to the District is as great as the power of a state legislature with respect to the state or any of its subdivisions. *Berman* v. *Parker*, 348 U. S. 26 (1954); *Atlantic Cleaners & Dyers* v. *United States, supra*, 286 U. S. at 434-435; *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 5 (1899); *Gibbons* v. *District of Columbia*, 116 U. S. 404, 407-408 (1886); *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690 (1878).

As early as 1820, this Court, through Chief Justice Marshall stated that persons choosing to reside in the District of Columbia have "voluntarily relinquished the right of representation, and * * * adopted the whole body of congress for * * * [their] legitimate government * * *." *Loughborough* v. *Blake*, 18 U. S. (5 Wheat.) 317, 324 (1820). In 1838, this Court stated that "Congress has the entire control over the district, for every purpose of government * * *." *Kendall* v. *United States*, 37 U. S. (12 Peters) 524, 619 (1838). Later, in *Shoemaker* v. *United States*, 147 U. S. 282, 300 (1893), this Court noted that Congress has "full and unlimited jurisdiction, both of a political and municipal nature, over the District of Columbia * * *." Thereafter, in *Heald* v. *District of Columbia*, 259 U. S. 114, 124 (1922), this Court, speaking through Mr. Justice Brandeis, rejected the contention that a local taxing statute was void because it subjected District of Columbia residents to taxation without representation, stating that: "Residents of the District lack the suffrage and have politically no voice in the expenditure of the money raised by taxation."

In *Binns* v. *United States*, 194 U. S. 486 (1904), this Court, in discussing the power of Congress over the District

of Columbia and the territories in a related context, stated:

> "It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, *that the form of government it shall establish is not prescribed,* and may not necessarily be the same in all the Territories. * * * In the District of Columbia it has adopted a different mode of government, and in Alaska still another. *It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may entrust to them a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto.* * * *" 194 U. S. at 491-492. [Emphasis added.]

And, more recently in *District of Columbia* v. *Thompson Co.*, 346 U. S. 100 (1953), this Court noted that the nature and extent of any local government for the District of Columbia is for Congress alone to decide, stating that:

> "* * * It would seem then that on the analogy of the delegation of powers of self-government and home rule both to municipalities and to territories there is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power, subject of course to constitutional limitation to which all lawmaking is subservient and *subject also to the power of Congress at any time to revise, alter, or revoke the authority granted.*" 346 U. S. at 109 [Emphasis added.]

Clearly, therefore, the contention that residents of the District of Columbia have a constitutional right to elect representatives to govern them in local matters, and that

to this extent the power of Congress over the seat of government is limited, cannot be reconciled with the explicit constitutional authority of Congress over the District as upheld by an unbroken line of decisions of this Court.

No question is here raised about the power of Congress to provide home rule for the District of Columbia, by authorizing the election of governing officials for local matters. Congress clearly has that power, has exercised it in the past, and has considered the enactment of home-rule legislation in recent years. Rather, the position here taken is simply that such a decision involves a matter plainly and unequivocally committed by the Constitution to the legislative branch. And it must be emphasized that the position here espoused should not in any way be viewed as indicating any opposition on the part of respondents to Congress providing home rule for the District. Indeed, respondents have publicly supported the enactment of legislation of this nature on numerous occasions. Such a determination, however, is beyond peradventure, constitutionally committed to Congress, not to the courts.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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